Office - Supreme Court, U.S
FILED
JUN 25 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1896

IN THE

Supreme Court of the United States

October Term, 1983

MOBIL OIL CORPORATION,
Petitioner,

vs.

JERRY A. BLANTON, ROY H. HEALEY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Where the jury was instructed and the verdict was rendered under standards which are applied to attempted monopolization in all federal circuits, does the Ninth Circuit's reference on appeal to the *Lessig* presumption provide an appropriate basis for certiorari?

2. Where the jury verdict as to attempted monopolization under § 2 of the Sherman Act is supported by unchallenged findings of violations of § 1 of the Sherman Act, would a grant of certiorari have any significant effect on the outcome of this case?

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Abbreviations

C.R.	Clerk's Record
Tr.	Transcript of trial
T.Ex.	Trial Exhibit
A-	Appendix to Mobil's Petition for Certiorari
a-	Appendix to Respondent's Brief in Opposition to Petition for Certiorari

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STATEMENT OF THE CASE

Mobil's Statement of the Case Overlooks a Fundamental Point: The Case Was Tried, and the Jury Verdict Rendered, Under the Standards Applied in All Circuits to Claims of Attempted Monopolization.

1. Mobil Asserts Legal Error, But Concedes That The Jury Instructions Were Proper.

Mobil's petition argues that substantial legal error was committed. For that reason, plaintiffs Blanton and Healey reprint here the relevant text of three jury instructions given in this case, to demonstrate that the standards Mobil seems

to assert should have been applied were in fact applied at trial. The jury was instructed that the following legal standards had to be met with regard to monopoly power, market definition, and attempted monopolization:

> . . . Monopoly power does not require 100% control of the market; nor does it necessarily require 50%, or any other given percentage. The test is not numerical; it is a practical test. Monopoly power is the power to control prices or exclude competition in a given market. In some cases there is a legal monopoly--such as in the case of a patent, copyright or trademark. What we are concerned with here is illegal monopolization, that is to say, monopoly power which has either been deliberately or purposefully obtained or maintained.
>
> . . .

C.R. 268, No. 28.

> Now, when a plaintiff proves monopolization of a market, that plaintiff must also provide proof by a preponderance of evidence that there is market or submarket which has been monopolized. You cannot have monopoly power in a vacuum. It must be monopoly power within a given geographic market or submarket and product market, or submarket. In order to determine what constitutes a market or submarket, it must first be determined what is the "area of effective competition," or the area to which one can turn for substitutes.
>
> . . .
>
> . . . As in the other instructions, there is no exact formula for you to apply: you must determine, by all the evidence, whether the markets and submarkets as alleged by plaintiffs are sufficiently distinct in commercial reality.
>
> . . .
>
> At all times, the question remains whether the area of competition identified by such factors is economically significant in terms of deciding what firms or products act as real and practical constraints on Mobil's power over prices or competition.

C.R. 268, No. 29 (reprinted in full in appendix to this brief; a-1 to a-2).

> In addition to monopolization, plaintiffs have alleged that defendant has attempted to monopolize trade. An attempt to monopolize has three elements: (1) specific intent to monopolize; (2) some act or acts done in furtherance of an intent to monopolize; and (3) which although insufficient to actually produce monopoly power creates a dangerous probability that the defendant will achieve a monopoly of the relevant market.

C.R. 268, No. 30 (reprinted in full in appendix to this brief; a-2 to a-3).

Mobil's petition is centered on attempted monopolization, but concedes that the attempted monopolization instruction given by the trial court is the very instruction which is compelled by the decisions of this Court. Petition, at 4-5. Indeed, Mobil has asserted no error and no conflict between the circuits as to the three jury instructions on monopolization, attempted monopolization or market definition.

2. Evidence Was Presented at Trial of Substantial Restraints of Trade at the Wholesale Level.

Although Mobil poses its issues in the form of a legal argument, the heart of its petition is found in what are essentially evidentiary arguments as to a purported failure of proof or as to an "impossible" case on market, dangerous probability, or impact on competition. Plaintiffs Blanton and Healey therefore provide this summary of the principal evidence adduced at trial, to demonstrate that any assertion as to failure of proof is not well-founded.

This case was filed by plaintiffs Blanton and Healey, who were independent operators of service stations. Mobil's Dealer Relations Policy states:

> The company has chosen to market a major portion of its automotive products through retail outlets operated by independent businessmen.

T. Ex. 304, at 1. Plaintiffs, like the other independent dealers Mobil dealt with, were not employees of Mobil. Although the Mobil name and logo were prominently placed, the dealers' stations were not company-operated outlets for Mobil Oil Corporation. Mobil provided plaintiffs and other independent dealers with a lease, supplied motor fuel to them, and promised them that they were free to be independent businessmen, to purchase freely from any source and to sell freely to any customer. As a result, it was understood that Mobil was to be in competition with other suppliers of oil, lubricants and "TBA&S" (tires, batteries, accessories and specialty items) in sales to such dealers. Tr. 1579-80 & 1957.

Plaintiffs contended that, despite these promises, Mobil tried to eliminate any competitive supplier from selling to these independent dealers, and in turn to prevent these dealers from reselling any non-Mobil products they did buy, thereby violating § 2 of the Sherman Act, 15 U.S.C. § 2. In connection with that proof, plaintiffs presented evidence of *per se* violations of § 1 of the Sherman Act, 15 U.S.C. § 1, such as tying, group boycott, and resale price maintenance, as well as other acts designed to enhance those restraints. At the trial there were twenty-two witnesses, more than 2000 pages of testimony, and more than 400 exhibits. This evidence demonstrated that dealers were told, for example, that if they bought from Delco they should have Delco paint their stations; that if they bought from Texaco it would be the last oil they would ever buy; and that if they bought from Time Oil they could jeopardize their leases. Tr. 114, 130, 619. Further, when plaintif Blanton tried to sell large volumes of automotive products to other dealers, Mobil threatened the dealers and coerced a boycott. Tr. 589-90, 862-63. After Blanton refused to buy an order of Mobil tires, Mobil

employees started to jackhammer his concrete pump pads. Tr. 142-43. After Healey refused a tire order, his rent was increased. Tr. 1283-84. Blanton ultimately lost his station. T.Ex. 258-59. He was then hired by plaintiff Healey who in turn lost his station. T.Ex. 143.

Based on such evidence and other evidence discussed in the Ninth Circuit opinion, *Blanton v. Mobil Oil Corporation*, 721 F.2d 1207 (9th Cir. 1983); Appendix to Mobil Petition, A-1*, the jury rendered verdicts in favor of plaintiffs on tying, group boycott, resale price maintenance, and attempted monopolization, in addition to its verdicts on various state law claims. Mobil does not challenge the verdicts as to predatory acts and *per se* violations of § 1 of the Sherman Act. Mobil centers its Petition on the market definition element of attempted monopolization under § 2 of the Sherman Act, even though it has not challenged plaintiffs' evidence of market.

3. Evidence Was Presented of Market and of Lack of Cross-Elasticity of Demand.

Plaintiffs presented evidence to prove that wholesale distribution and sales of oil, lubricants and TBA&S to dealers involved, and were recognized in the industry as involving, separate submarkets. For example, the evidence included: Mobil's admissions that it did not consider other oil companies to be its competition in sales to its own dealers, Tr. 2002; Mobil's own statement that it would not give

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* All references to the Ninth Circuit's opinion in this case will be made by parallel citation to the federal reporter, and to the pages of the opinion as reprinted in the Appendix to Mobil's petition.

dealers the same low price that it gave to retail outlets such as Safeway because it considered retail service station dealers to be in a separate market, described as a different "class of trade", Tr. 125 & 864; Mobil's distributor stating that sales to dealers of different brands were handled by the industry as separate and distinct markets, Tr. 1486-89; proof that Mobil could exclude and had excluded competition such as Texaco, Delco, Time Oil, and plaintiff Blanton, Tr. 114, 130-31, 589-90, 619, 863-64.

This Court has previously ruled that when a slight decrease in price causes "a considerable number of customers . . . to switch," such evidence indicates that there is a high cross-elasticity of demand and therefore would be proof "that the products compete in the same market." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 400 (1956). In this case, plaintiffs presented evidence to show that despite substantial price differences, there was no significant switch by dealers or other change in wholesale purchasing patterns. For example, this included evidence (a) that Mobil made wholesale sales of Mobil products to dealers at prices as much as 20 to 25% higher than dealers could buy the same or comparable products at retail from outlets such as Safeway, Tr. 132, 895 & 1270, (b) that Mobil refused to drop its prices to dealers in response to competitive price requests, Tr. 1794, but (c) that despite this pricing 80% or more of the "independent" dealers still bought from Mobil on any given promotion, T.Ex. 145.

Such evidence as to lack of cross-elasticity of demand fits the requirements of *du Pont*, *supra*. In sum, evidence was presented at trial to show that in fact wholesale sales of TBA&S products occurred in distinct and identifiable

submarkets in economic reality, with no significant price sensitivity to other submarkets.

As a result, this case raised an evidentiary question only, which was for the jury to decide, inasmuch as the jury instructions were conceded to be correct and market definition is a factual issue. The weighing of evidence is not an appropriate issue for certiorari.

4. Mobil's Petition Raises a Narrow Issue Which Had No Effect on the Trial and Which Is of No General Public Significance.

Because it has not challenged the jury instructions, Mobil's claim of legal error as to attempted monopolization is necessarily very limited. It is even further limited because market definition is a factual issue, and on appeal to the Ninth Circuit, Mobil did not challenge the factual basis for the jury's market finding:

> . . .Mobil has pointed to nothing in the record that would lead us to question the jury's factual finding. . . .

721 F.2d at 1213; A-11.

Mobil had contended on appeal simply that the market definition found by the jury could be disposed of as a matter of law, and without reference to the record. The Ninth Circuit ruled that market definition is a question of fact, and that the jury's finding is not to be disturbed unless clearly erroneous. *Id.* It then rejected Mobil's legal argument by referring to *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964). On certiorari, Mobil contests only that reference to *Lessig*, which the Ninth Circuit had used to reject Mobil's argument that the jury's factual finding could be dismissed as a matter of law.

The issue raised by Mobil on certiorari, then, is not a question of how the case was tried, the jury instructed, or the verdict rendered, or even whether the evidence was sufficient, but is simply a question of how the Ninth Circuit drafted its opinion. The *Lessig* reference in that opinion is not essential to the judgment entered in this case. Mobil's petition therefore does not raise any issue of substantial importance to the result in this case, or to the parties, let alone on the broader basis required by Sup. Ct. R. 17.

ARGUMENT

A. Summary of the Argument

Just as it sought to do on appeal to the Ninth Circuit, Mobil is seeking on certiorari to create a legal issue from a factual case which was submitted to the jury under admittedly correct instructions. Although the *Lessig* presumption has been criticized by other Circuits, *see Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1348 (3rd Cir.), *cert. denied*, 419 U.S. 869 (1975), this case is not an appropriate one for this Court to address such an issue. Because Mobil has not challenged the instructions to the jury or the sufficiency of the record to support the jury's verdict, review by this Court of the Ninth Circuit's reference to *Lessig* would have no necessary effect on the outcome of this case.

The jury's attempted monopolization verdict in this case was consistent with the record, the three elements applied in all Circuits, and the purpose of the antitrust laws. In all Circuits including the Ninth it is recognized that attempted monopolization has three elements: intent, act and dangerous probability. The jury was so instructed in this case, and so found. The *Lessig* presumption permits an inference to be drawn as to the third element, but only in the limited

situation where a plaintiff has presented substantial evidence of a *per se* violation or other significant restraint of trade.

In any case, the jury here was not instructed as to the *Lessig* presumption, and made no use of it. Therefore, the purported "conflict" between the Circuits, which does not involve a conflict as to the three basic elements of attempted monopolization, does not involve anything that affected the trial or fact-finding process in this case.

Mobil's Petition is not well-founded because of one additional reason. Mobil has misread the record in its attempt to create an issue for appeal and for certiorari.

B. Mobil's Petition Is Based Upon Erroneous Assertions.

In its petition, Mobil seeks review based upon a series of assertions that are contrary to the record, each of which is addressed in turn.

1. Mobil Erroneously Asserts that this Case Involves a "Single Brand".

Mobil attempts to make it appear that this case raises the issue of a single manufacturer's sales of its own products. Earlier, Mobil had asserted on appeal that the submarket involved a verdict of only "Mobil-branded and Mobil-brokered" products. The Ninth Circuit stated that it "admit[ted] to some puzzlement over Mobil's persistent mischaracterization of the jury verdict," 721 F.2d at 1213 n. 4; A-10, because the jury had in fact found by special verdict form that Mobil's conduct constituted an attempt to monopolize sales of "Mobil-branded and non-Mobil-branded" products to Mobil dealers. On its face, the jury verdict form includes sales by suppliers other than Mobil.

In its petition for certiorari, Mobil continues to assert that the issue is sales "by a single manufacturer-distributor," Petition at 10, even though the trial court had declined to give any jury instruction containing a limitation as to the identity of the supplier. 721 F.2d at 1213 n. 4; A-10. What is critical are the legal standards actually given to the jury. Mobil's arguments on certiorari must address an error actually occurring below, not some purported error that Mobil wishes had occurred.

2. *Mobil Erroneously Asserts that the Relevant Market Is Sales to Consumers.*

Mobil argues in its Petition that the issue involves products which are fungible to the ultimate retail consumer, Petition at 6, and it makes only passing reference to the fact that the market involved sales to dealers by suppliers, not by dealers to consumers. An argument that certain products might be physically similar or otherwise considered interchangeable by ultimate consumers on resale, proves nothing as to cross-elasticity of demand or the existence of economic barriers at the *wholesale* level. Mobil's Petition largely attempts to avoid the fact that at trial it had asserted that the overall product market was sales *to dealers*, which occur at the wholesale level, rather than to consumers at retail:

> Mobil contends that it must compete with other sellers of oil, tires, batteries and accessory items, such as Valvoline, Havoline, Firestone and Goodyear, *and that the product market is the sales of any type or brands of TBA&S, oil and lubricants to any type of service station dealer*, Mobil, Texaco, Union, Shell or any other dealer.

C.R. 268, No. 29 (emphasis added); a-2.

Mobil cannot now be heard to argue, contrary to the law of this case and the record, that fungibility to the consumer at retail is the issue, rather than to the dealer at wholesale.

3. *Mobil Erroneously Asserts a Lack of Evidence.*

Mobil's petition asserts that there was no "showing of dangerous probability," Petition at i, and no proof of "detrimental impact on competition." *Id.* at i-ii. Mobil also makes bald assertions such as its claim that its oil and TBA&S are not so dominant as to destroy competition, Petition at 7, but refers to no supporting evidence. Mobil then tries to avoid the evidentiary issues it has raised, and portray the issue as one of law. Mobil claims that the verdict was for "attempted monopoly of a market which could not, as a matter of law, constitute a relevant market for antitrust purposes," *Id.* at 1, and that the case involves a legal impossibility, or an attempt to do "that which, if accomplished, would not violate the antitrust laws." *Id.* at 8. Despite those claims, the record contains substantial evidence that Mobil intentionally excluded competitors from a submarket that had become distinct in commercial reality.

Mobil's avoidance of the evidence is contrary to this Court's directive that in antitrust cases

> [the legal] guidelines [for analysis of markets] offer no precise formula for judgment and *they necessitate, rather than avoid, careful consideration based on the entire record.*

United States v. Continental Can Co., 378 U.S. 441, 449 (1964) (emphasis added). Moreover, factual findings as to market are not to be overturned unless "clearly erroneous." *International Boxing Club v. United States*, 358 U.S. 242, 244-245 (1959). Mobil must address the factual record if it is to challenge market definition, but it has not done so.

This Court further explained in the case of *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962), that submarkets may be defined by examining

> such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors.

In its petition, Mobil indirectly concedes this point when it asserts that the question of market definition cannot be judged "in a vacuum," citing *M.A.P. Oil Co. v. Texaco*, 691 F.2d 1303 (9th Cir. 1982); Petition at 20. The jury was explicitly so instructed in this case:

> . . . You cannot have monopoly power in a vacuum. It must be monopoly power within a given geographic market or submarket and product market, or submarket . . . .

C.R. 268, No. 29; a-1. Despite its own admission that market cannot be judged in a vacuum, and this Court's direction in *Continental Can* that market decisions necessitate careful consideration of the record, Mobil itself fails to address the factual record as to market. Having lost on a factual issue, Mobil has sought to transmute it into a legal issue. That it cannot do.

(a) Plaintiffs' Evidence of Dangerous Probability

Mobil argues that certiorari should be granted because the element of "dangerous probability" was purportedly disregarded. In fact, the jury was instructed as to all three elements sought by Mobil, including dangerous probability of achieving monopoly. C.R. 268, No. 30; a-2. That instruction does not conflict with any other Circuit.

Monopoly power is the power either to set prices or to exclude competition. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). The jury was so instructed. C.R. 268, No. 28. A dangerous probability of monopoly power therefore by definition means a dangerous probability of the power either to set prices or to exclude competition. As has been

summarized above, plaintiffs presented substantial evidence that Mobil already had substantial power to do *both*: to set prices without regard to alternative sources *and* to exclude competition, and that it exercised that power. That evidence has not been disputed by Mobil on appeal or on certiorari. 721 F.2d at 1213; A-11.

(b) Plaintiff's Evidence of Impact on Competition.

In its Statement of Issues, Mobil asserts that there was no showing that defendant's conduct had a detrimental impact on competition. Issue No. 2. Predatory activity, in particular such Mobil violations as tying, group boycotts, and resale price maintenance, are classified as *per se* violations precisely because of their "pernicious effect on competition." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). For Mobil to argue otherwise is to grasp at straws.

Mobil does ultimately concede, Petition at 17, that *per se* violations involve injury to competition. However, Mobil then tries to insert arguments on the dollar amount of damages in order to support its claim that there was no proof of the fact of damage in this case. In its petition for certiorari, Mobil did not list any issue concerning plaintiffs' damages or their measurement. Mobil's arguments, Petition at 4, 5 & 17, as to the amount of damages, should therefore be stricken from any consideration on certiorari.*

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* However, in order to set the record straight, and to demonstrate that plaintiffs do not waive any right to contest Mobil's assertions as to damages, plaintiffs set forth the following corrections.

Mobil makes cryptic references in its brief to the jury's purported "finding" of "0" damages for certain individual antitrust offenses. In so doing, Mobil omits to tell this Court that at Mobil's own request, C.R. 248, No. 93, the jury had been instructed that a plaintiff could not recover

In any case, plaintiffs' evidence of effect on competition is not limited to the undisputed *per se* violations, but also includes evidence discussed above that Mobil could and did set prices *and* exclude competitors from selling in a submarket which had become distinct in commercial reality, as a result of which the public could not benefit from the competition that those dealers could have provided if they had been free to purchase non-Mobil products.

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twice for the same injury, C.R. 268, No. 39. The jury then rendered verdicts finding a series of *per se* violations which it specified to be part of Mobil's attempted monopolization, and awarded damages once under attempted monopolization; it did not award an additional or duplicative award under the individual *per se* offenses. C.R. 273. For those individual included offenses, the jury simply inserted "0," and stated that damages for those specific *per se* violations were included within the attempted monopolization verdict. *Id.* The Ninth Circuit closely examined the jury instructions and interrogatories, ruling that the jury's actions were "not only reconcilable, but sensible." 721 F.2d at 1213; A-10.

Mobil also asserts on certiorari that plaintiffs' § 2 damages "far exceed" plaintiffs' § 1 damages. Petition at 17. Mobil omits to state that on appeal it had argued, as the Ninth Circuit noted, that plaintiffs' § 1 damages were "exactly the same" as its § 2 damages. 721 F.2d at 1213; A-9. Mobil now argues that tying and price-fixing damages were not the same as attempted monopolization damages. Petition at 17, ignoring such evidence as the substantial losses caused by group boycott. T.Ex. 296 & 297 (as much as $250,000 in additional TBA&S gross profits after Blanton started another station). In any case, the Ninth Circuit ruled, further, that plaintiffs had presented "more than sufficient evidence to support the jury's finding of causal antitrust liability," together with "substantial evidence of losses caused by concrete acts of Mobil . . . [as well as] 'before and after' evidence, comparing a plaintiff's restrained business with a comparable business operating free of antitrust restraints . . . [which evidence was] sufficient to justify the amount of antitrust damages awarded by the jury." 721 F.2d, at 1215-16; A-14 to A-17.

Despite its arguments on the topic, Mobil has listed no issue regarding damages. Even had Mobil attempted to pose any issue on damages, factual arguments as to the amount of a damage award could be made in every case, and do not constitute a sufficient or reasonable basis for a grant of certiorari.

C. This Case Rests On Factual Issues And Is Not Appropriate for Certiorari.

1. The Lessig Presumption Is Not Essential, And Is Not the "Sole" Basis for the Decision Below.

Mobil asserts that the Ninth Circuit had sustained the jury verdict "solely" on the basis of *Lessig*. Petition at 1. Mobil attempts to portray the Ninth Circuit's ruling as one in which that court had agreed that the market definition was faulty and the market evidence insufficient. In its statement of the case, Mobil asserts

> The Ninth Circuit did not dispute that the market upon which the jury had based its verdict had no relevance under the Sherman Act. The panel . . . simply declared relevant market irrelevant . . .

Petition at 5.

The Ninth Circuit did not rest its affirmance "solely" on *Lessig*, nor did it imply that plaintiffs' evidence on market definition was insufficient. The Ninth Circuit engaged in an extensive analysis of the record. It commenced by carefully reviewing the evidence as to the *per se* offenses (tying, group boycott and resale price maintenance), 721 F.2d at 1210-12, A-3 to A-9; causation and measurement of antitrust damages, *Id.* at 1215-16, A-14 to A-17; evidence of price insensitivity, *Id.* at 1211, A-4; and evidence of exclusion of competition, *Id.* at 1211-12, A-4 to A-7. The Ninth Circuit held, in accordance with all the federal Circuits, that market definition is a factual issue, and specifically noted Mobil's failure to present any basis to contradict the jury's factual finding:

> . . .Mobil has pointed to nothing in the record that would lead us to question the jury's factual finding. . . .

721 F.2d at 1213; A-11.

The Ninth Circuit had already stated, again in accordance with all Circuits, that a market finding cannot be set aside unless clearly erroneous. 721 F.2d at 1213; A-10. *See also. International Boxing Box Club v. United States*, 358 U.S. 242, 244-45 (1959). Because Mobil had presented no basis for setting aside the factual decision, the Ninth Circuit's decision was sufficient at that point. However, Mobil had claimed that, regardless of the evidence of market, the Court should rule as a matter of law against the market definition found by the jury. The Ninth Circuit declined to reach that additional and novel legal issue posed by Mobil. In order to do so, the Ninth Circuit cited *Lessig* in stating that "We need not resolve the legal question presented by Mobil because it is clear that the jury's attempted monopolization finding may be sustained under *Lessig* . . ." 721 F.2d at 1213; A-11.

2. This Case Presents Factual Issues and No Significant Conflict Between the Circuits.

The Ninth Circuit justified its choice not to reach Mobil's novel legal argument by relying on *Lessig's* statement that under attempted monopolization the relevant market is "not in issue," citing *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 n. 23 (1956). Mobil would therefore have this Court believe that the Ninth Circuit therefore does not consider market definition at all in attempt cases. Again, Mobil has overstated its argument. The Ninth Circuit ruled

> Despite the sweeping language of *Lessig*, however, it is clear that we do require a showing of relevant market in circumstances where conduct of the attempted monopolizer is ambiguous or not clearly predatory.

721 F.2d at 1214; A-11.

Further, Mobil omits to address the limitations the Ninth

Circuit has in recent years placed on *Lessig*. *See e.g., Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 925-926 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981). As the Ninth Circuit stated in *Hunt-Wesson*, and in the instant case, proof of market power is required under *Lessig* when the claim is that a seller used its dominant position in the market to attempt to monopolize; proof of market power only may be disposed of when the seller has engaged in predatory conduct or *per se* violations specifically intended to exclude competition. *Id.* The *Lessig* rule does not apply unless the conduct is *clearly* predatory, that is, unless an injury to competition is proved. Where injury to competition has not been proved by clearly predatory conduct, under *Lessig* a plaintiff must still prove separately that there has been a dangerous probability that the alleged intentional anticompetitive conduct did have a substantial probability of succeeding to monopolize the relevant market, and thereby of injuring competition.

As applied, therefore, the *Lessig* rule does not do away with the requirement of showing injury to competition. Nor does it conflict with the interpretation of the Sherman Act in the early years after the law was passed. In the seminal case of *Standard Oil Company of New Jersey, et al. v. United States*, 221 U.S. 1 (1911), in which the Supreme Court established the "rule of reason" for § 1 offenses, the Court also analyzed § 2. The Court ruled that the Act's purpose "was to prevent undue restraints of every kind or nature . . . [and that the Act] indicates a consciousness that the freedom of the individual right to contract . . . was the most efficient means for the prevention of monopoly . . ." *Id.* at 62. Plaintiffs' case here involves Mobil's restrictions on independent dealers' rights to contract freely for purchases and sales.

The Court in *Standard Oil* also ruled that § 2

> seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the 1st section, that is, restraints of trade . . .

Id. at 61. Plaintiffs' case here involves just such a series of § 1 violations. The Court in *Standard Oil* concluded that the Sherman Act was in keeping with the trend in the common law to cover "new manifestations of conduct or of dealing which it was thought justified the inference of intent to do the wrong which it had been the purpose to prevent from the beginning." *Id.* at 57-58.

Thus, *Lessig* is neither illogical nor unsound, nor in this case has it resulted in a verdict contrary to this Court's decisions. Specific intent to do the wrong was described as significant by this Court in *Standard Oil*. *Id.* *Lessig* is in accord, for it sets up an inference which comes into play only when specific intent has been proved by proof of predatory acts.

The *Lessig* inference is used in a limited situation where there has been a showing of predatory acts or intent. As a result of that inference, market is not automatically placed at issue. Mobil could have presented evidence to rebut the inference, or to counter plaintiffs' substantial evidence of market, but it did not do so. In any case, the *Lessig* reference in the Ninth Circuit was used only after the Court had reviewed plaintiffs' evidence and found that Mobil had left it unchallenged, and then only to reject Mobil's argument that the market definition found by the jury could be ruled on as a matter of law, and without regard to the record.

The jury in this case did not use the *Lessig* presumption, and Mobil has not challenged the evidence supporting their decision. *Lessig* was used here only to dispose of Mobil's

assertion that plaintiffs' market was a legal impossibility. Such a use of *Lessig* does not provide an issue of such significance that certiorari should be granted.

3. Even Under Mobil's Arguments, Reversal of Section 2 Verdict Would Have No Effect.

A grant of certiorari would have no necessary effect on the result of this case, even were *Lessig* ultimately to be overturned. As the Ninth Circuit stated, "[T]he damages awarded for 'attempted monopoly' [under Section 2 of the Sherman Act] were, in Mobil's terms, 'exactly the same' as the damages suffered by plaintiffs from all the component antitrust violations [under Section 1 of the Sherman Act]." 721 F.2d at 1213; A-9. Therefore, even were there some error in the Section 2 verdict, the logical result of Mobil's position is that a reversal of *Lessig* would have no impact on the outcome of this case under Section 1.

CONCLUSION

A writ of certiorari is discretionary, and will be granted only where there are special and important reasons therefor. *Fay v. Noia*, 372 U.S. 391, 436 (1963). Certiorari is to be granted involving principles the settlement of which is important to the public. *Rice v. Sioux City Memorial Park Cemetery, Inc. et al.*, 349 U.S. 70, 79 (1955).

In this case, there is no dispute as to plaintiffs' evidence. There is no dispute that the jury found a series of predatory and *per se* violations of § 1 of the Sherman Act, 15 U.S.C. § 1, as well as attempted monopolization under § 2. 15 U.S.C. § 2. There is no dispute as to the propriety of the jury instructions under which the evidence was submitted. A review

of the Ninth Circuit's reference to *Lessig* in its opinion would have no necessary effect on the result in this case. Certiorari is not appropriate.

Respectfully submitted this
22nd day of June, 1984.

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERRY A. BLANTON, Plaintiff, vs. MOBIL OIL CORPORATION, Defendant.	)	No. C77-145M
ROY H. HEALEY, Plaintiff, vs. MOBIL OIL CORPORATION, Defendant.	)	No. C77-162M

COURT'S INSTRUCTIONS TO THE JURY

(March 31, 1982)

INSTRUCTION NO. 29

Now, when a plaintiff proves monopolization of a market, that plaintiff must also provide proof by a preponderance of evidence that there is a market or submarket which has been monopolized. You cannot have monopoly power in a vacuum. It must be monopoly power within a given geographic market or submarket and product market, or submarket. In order to determine what constitutes a market or submarket, it must first be determined what is the "area of effective competition," or the area to which one can turn for substitutes.

Plaintiffs contend that the geographic market is Western Washington. Plaintiffs also contend that the product market is TBA&S, oil and lubricant sales to dealers, and that the product submarket is Mobil-branded and non-Mobil branded TBA&S, oil and lubricant sales to Mobil dealers. Mobil contends that it must compete with other sellers of oil, tires, batteries and accessory items, such as Valvoline, Havoline, Firestone and Goodyear and that the product market is the sales of any type or brands of TBA&S, oil and lubricants to any type of service station dealer, Mobil, Texaco, Union, Shell or any other dealer. As in the other instructions, there is no exact formula for you to apply: you must determine, by all the evidence, whether the markets and submarkets as alleged by plaintiffs are sufficiently distinct in commercial reality. To make this decision you must decide whether the distribution of Mobil-branded and Mobil brokered TBA&S, oil and lubes to its dealers in Western Washington, or any other product and geographic market, was treated by Mobil and by others as a distinct market; whether it was relatively immune from competition or substitutes, or whether it was acquired by means that show attempt to monopolize. In general, well-defined submarkets may exist which, in themselves, constitute relevant product markets for antitrust purposes.

At all times, the question remains whether the area of competition identified by such factors is economically significant in terms of deciding what firms or products act as real and practical constraints on Mobil's power over prices or competition.

INSTRUCTION NO. 30

In addition to monopolization, plaintiffs have alleged that defendant has attempted to monopolize trade. An attempt to monopolize has three elements: (1) specific intent to monopolize; (2) some act or acts done in furtherance of an intent to monopolize; and (3) which although insufficient to actually produce monopoly power creates a dangerous probability that the defendant will achieve a monopoly of the relevant market.

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a person's itent [sic] from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is for you to decide what facts have been established by the evidence.